Conditionality in social security

Conditionality in social security: lessons from the household duties test

Dr Jackie Gulland

Abstract

Discussions of conditionality and sanctions in benefits policy are usually concerned with behavioural conditionality, for example evidence of work-seeking activities. However, eligibility rules for benefits also create conditions of entitlement. Failure to meet these conditions does not lead to sanctions. Instead, claimants are not entitled to the benefit at all. This article discusses the controversial and short-lived 'Housewives Non-contributory Invalidity Pension' (HNCIP), a non-contributory, non-means-tested, benefit, which was available to married and co-habiting women in the UK in the late 1970s and early 1980s. One of the eligibility requirements of the benefit was that women had to establish that they were 'incapable of normal household duties'. This article draws on archive and other historical sources on the introduction, implementation and subsequent abolition of HNCIP to consider how this form of conditionality worked in practice. The household duties test for HNCIP was discriminatory since it applied to married and co-habiting women, with no such rule for men or single women. Although the test appears anachronistic today, it represents a form of eligibility conditionality in benefits policy which is sometimes overlooked in the debate on conditionality and sanctions. There are three lessons we can learn from this: that category conditionality can be as important in excluding people from entitlement to financial support as behavioural conditionality; that category conditionality can lead to equally humiliating and degrading assessments; and that assumptions about what is 'normal' are heavily constructed by assumptions about social structures.

Introduction

Michael Adler's new book *Cruel, Inhuman or Degrading Treatment? Benefit Sanctions in the UK* describes the development of increasingly harsh sanctions applied to benefit claimants who fail to meet tests of work-focussed conditionality in the UK social security system[1]. With this book, Adler joins many recent critics of the sanctions regimes in the UK.[2] As Adler notes, however, this type of behavioural, work-focussed conditionality is one of three ways in which benefits are conditional. Entitlement to benefits is also determined by what Clasen and Clegg have described as category and circumstance conditions.[3] These conditions are not related to the behaviour of claimants but define whether or not a claimant is eligible for a benefit in the first place. Circumstance conditions include such elements as means-testing, national insurance contributions and citizenship or residence conditions. Category conditions on the other hand concern whether or not a claimant fits within a category of entitlement, such as being over a certain age, unemployed, or assessed as sufficiently ill or disabled to qualify. While recent debates in social security policy have focussed on the problems associated with behavioural conditions and their associated sanctions, circumstance and category conditions can be equally exclusionary in their effect on claimants. Such conditions also carry key messages regarding expectations about claimant behaviour. People who do not have sufficient national insurance contributions are not entitled to national insurance benefits. People whose household income or capital is over a certain level are not entitled to means-

[1] M. Adler, *Cruel, Inhuman or Degrading Treatment? Benefit Sanctions in the UK* (Basingstoke: Palgrave Pivot, 2018).

[2] For example P. Dwyer, 'Punitive and Ineffective: Benefit Sanctions within Social Security', *Journal of Social Security Law*, 2018, 142–57; P. Dwyer and S. Wright, 'Universal Credit, Ubiquitous Conditionality and Its Implications', *Journal of Poverty and Social Justice*, (2014), 22(1), 27–39; B. Watts, and S. Fitzpatrick, *Welfare Conditionality* (Abingdon: Routledge, 2018).

[3] J. Clasen and D. Clegg, 'Levels and Levers of Conditionality: Measuring Change within Welfare States', in *Investigating Welfare State Change: The Dependent Variable Problem in Comparative Analysis*, ed. J. Clasen and N. Siegel (Cheltenham: Edward Elgar, 2007).

tested benefits. People who have not lived in a particular place for long enough or who fail to meet citizenship tests are not entitled to many benefits. [4] Such circumstance conditions may seem fair but they systematically exclude certain groups of people, particularly those who have been unable to engage in the labour market in their own right or whose citizenship or migration status does not fit expectations.

Category conditions are equally exclusionary. Changing definitions of incapacity for work are key examples of this. The introduction of Incapacity Benefit in the 1990s, followed by Employment and Support Allowance in 2008, involved new definitions of incapacity for work and were developed with the specific aim of reducing the number of successful claims. As well as being exclusionary, the process of assessment can also be humiliating. This is particularly so in assessments of people's health or disability, which often involve intrusive investigations into their daily lives. Recent reports on assessments for Employment and Support Allowance and Personal Independence Payments provide evidence of this in today's social security assessments.[5] Meanwhile the Scottish Government is attempting to find ways of developing assessments which put dignity and respect at the centre of social security assessment.[6]

[4] For a discussion of how these conditions interact with other forms of conditionality, see I. Shutes,'Work-Related Conditionality and the Access to Social Benefits of National Citizens, EU and Non-EU Citizens', *Journal of Social Policy*, (2016), 45, 691–707; C. Barnard and A. Ludlow, '"Undeserving" EU Migrants "Milking Britain's Benefits"? EU Citizens before Social Security Tribunals', *Public Law*, (2019), 260–80; C. O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK*, (Oxford: Hart Publishing, 2017).

[5] See for example House of Commons Work and Pensions Committee, *PIP and ESA Assessments: Claimant Experiences Fourth Report of Session 2017-19 HC355*, (2018)

[6] M. Simpson, G. McKeever and A. Gray 'From Principles to Practice: Social Security in the Scottish Laboratory of Democracy', *Journal of Social Security Law*, 26 (2019), 13–31.

These social security developments are at the forefront of debate today but we can also find examples of exclusionary entitlement conditions and humiliating assessment processes in the past. This article looks at the particular example of a short-lived benefit aimed specifically at married and cohabiting women in the late 1970s and early 1980s: Housewives Non-Contributory Invalidity Pension (HNCIP), which included a specific test of capacity for 'normal household duties', a vague and intrusive test of women's capacity for cooking, cleaning and other household tasks. Although the test appears anachronistic today, it illustrates how eligibility criteria can create exclusionary and demeaning conditions for benefits claimants.

Methods

This paper is based on an analysis of documentary sources from the 1970s and 1980s, some of which were published at the time and others which are in the National Archives in London. Sources include National Insurance Commissioners' decisions, civil service files and reports published by Government and third sector organisations. These include the civil service files regarding key Commissioners' Decisions in 1978 and proposals to replace HNCIP with Severe Disablement Allowance in the 1980s. My analysis of these documents involves looking through the lense of gender and critical disability studies. Feminist scholars have long noted the gendered division of labour in the home and in the workplace and the way in which the social security system both reflects and supports this.[7] HNCIP provides a particularly stark example of this and, although its discriminatory nature was recognised at the time of its implementation, it is helpful to continue to consider the assumptions behind HNCIP from a gender perspective. Insights from critical disability studies enable us to see

[7] For example, M. Daly and K. Rake, *Gender and the Welfare State* (Oxford: Polity, 2003); J. Lewis, *Work–Family Balance, Gender and Policy* (Cheltenham: Edward Elgar Publishing, 2009); R. Lister, '"She Has Other Duties" - Women, Citizenship and Social Security', in *Social Security and Social Change: New Challenges to the Beveridge Model*, ed. by S. Baldwin and J. Falkingham (Hemel Hempstead: Harvester Wheatsheaf, 1994); A. Oakley, *The Sociology of Housework* (Oxford: Martin Robertson, 1974).

how social security systems construct disability within an individualised, medical model, where the focus is on claimants' individual impairments and loss of function, compared to a social model of disability which would look instead at the structural barriers which create disability.[8] Social security systems are inherently individualised since they require that claimants demonstrate their personal limitations, often with little regard to the structural barriers which exclude people from the workplace or from full participation in society. In relation to social security, disability studies scholars have questioned the normalisation of 'work' as the basis of entitlement.[9] A disability studies approach enables us to consider HNCIP by looking at the assumptions made about disabled people in its design and implementation.

Background to HNCIP

Housewives Non-contributory Invalidity Pension (HNCIP) was developed as part of a programme of expansion in benefits for disabled people in the 1970s, which included the introduction of Attendance Allowance, carers' benefits and more generous payments for Invalidity Benefit.[10] Non-Contributory Invalidity Pension (NCIP) was introduced through the Social Security Act 1975 and was aimed at disabled people who were unable to work but who did not have sufficient national insurance contributions to qualify for the mainstream Invalidity Benefit. NCIP was targeted at people who had been disabled since their youth and had never had the chance to be in paid employment. This benefit provides an example of a

[8] First described in this way by M. Oliver, *Understanding Disability from Theory to Practice* (Basingstoke: Macmillan, 1996); For a more recent discussion of thinking on different models of disability, see J. Grue, *Disability and Discourse Analysis* (Farnham: Ashgate, 2015).
[9] For example, C. Barnes, 'Re-Thinking Disability, Work and Welfare', *Sociology Compass*, 6 (2012), 472–84
[10] For details see A. Borsay, *Disability and Social Policy in Britain since 1750: A History of Exclusion* (Basingstoke, Palgrave Macmillan, 2004); N. Harris, 'Beveridge and Beyond: The Shift from Insurance to Means-Testing', in *Social Security Law in Context*, ed. N. Harris, (Oxford: Oxford University Press, 2000); S. Shah, and M. Priestley, *Disability and Social Change: Private Lives and Public Policies*. (Bristol: Policy Press, 2011).

widening of the 'circumstance' conditions for incapacity benefits although it was paid at two-thirds of the rate paid for mainstream out of work benefits.

The main Non-Contributory Invalidity Pension (NCIP) was payable only to men and to single women. Policy makers at the time believed that such a benefit should not be payable to married women, since it was considered that married women would not be in the labour market as their 'normal job is in the home'.[11] On the basis that married women's role was to do 'household work', they could only qualify for the new benefit, if they could show that they were incapable of paid work *and* that they were incapable of household duties.[12]

When NCIP was introduced in the Social Security Act 1975, women were excluded from eligibility for the main NCIP if they were married, cohabiting with a man, or if they were separated and supported financially by a man, unless they were 'incapable of performing normal household duties.[13] The definition of this phrase was to be provided in regulations. Payments under this section became known as Housewives Non-Contributory Invalidity Pension or HNCIP. The term 'Housewives' did not appear in the legislation but the benefit was widely known by this name, including on civil service documents and claim forms (Form BF 450). A Government leaflet about the scheme had the title 'HNCIP a pension for disabled married women who can't carry out household tasks.[14] The term HNCIP was also used to describe the administration of the benefit, with an 'HNCIP Unit' in Newcastle.[15] It is not clear how the term 'Housewives' was added to the name. The specific qualifying rules (or in fact disqualifying rules for NCIP) were that the claimants were women and that they were married to, cohabiting with, or supported by men. The rules did not require that they were

[11] House of Commons, *Social Security Act 1973. Social Security Provision for Chronically Sick and Disabled People* (London: HMSO, 1974), para 43.
[12] Ibid, para 43
[13] Social Security Act 1975, 36(2)
[14] Leaflet NI.214, Nov 1983
[15] referred to in documents in National Archives file PIN 15/4483

'housewives'. However, the use of this term in official discourse carried an important message that married and cohabiting women were expected to be housewives. The inclusion of women who were cohabiting or who were separated but financially supported by men, is evidence that policy makers made assumptions about all women's financial dependence on men, even when they were not married or when marriages had broken down.[16]

HNCIP was controversial from the outset, with women's groups, poverty campaigners and disability groups protesting at its discriminatory presumptions.[17] Disability and women's rights groups joined together to form 'The Equal Rights for Disabled Women Campaign', to highlight the discriminatory nature of the benefit.[18] This organisation funded Loach and Lister to carry out research on HNCIP in 1978. Using evidence of women's employment patterns at the time, Loach and Lister claimed that the assumption that married women were primarily housewives was 'wholly anachronistic in comparison with the employment patterns of married women today'. [19] They concluded that 'The ability of a married woman to do the housework should therefore be of no more relevance to her claim for NCIP than the ability of a man or a single woman to do housework'.[20] The National Insurance Advisory Committee also noted, in its report on the implementation of the legislation in 1977, that most of the organisations who had commented on the benefit had pointed out its discriminatory nature and had recommended that married women should qualify for NCIP on the same basis as

[16] The cohabitation rule in means-tested benefits and for widows' benefits has long been a matter of concern to feminist commentators, see R. Lister, *As man and wife? : A study of the cohabitation rule* (London: Child Poverty Action Group, 1973). For a more recent discussion, see S. Kelly, *Understanding Co-Habitation: A Critical Study of the Living Together as Husband and Wife Rule in UK Social Security Law* (Edinburgh, Centre for Research on Families and Relationships, 2008) <https://www.era.lib.ed.ac.uk/handle/1842/2769> For the legal position in 1978, see A. Ogus and E. Barendt, *The Law of Social Security* (London: Butterworths, 1978).

[17] I. Loach and R. Lister, *Second Class Disabled - a Report on the Non-Contributory Invalidity Pension for Married Women* (London: Equal Rights for Disabled Women Campaign, 1978); National Insurance Advisory Committee, *Social Security Act 1975, Social Security (Non-Contributory Invalidity Pension) Amendment Regulations 1977 (S.I. 1977 No. 1312). Report of the National Insurance Advisory Committee* (London: HMSO, 1977).

[18] M. Hyman, 'Housewives' Non-contributory Invalidity Pension: the case for the abolition of the Household Duties Test in the United Kingdom', *International Social Security Review*, 35 (1982), 319–32

[19] Loach and Lister, p21

[20] Loach and Lister p27

men and single women. However the Committee's remit did not include the possibility of recommending this and so the focus was on implementation only.[21] Loach and Lister had also noted in their report in 1978 that, although their main objection to the household duties test was its inherently discriminatory nature, it was also 'an impossible test'.[22] Despite the objections from women's groups and disability organisations, it was this practical implementation of the test which produced the real challenge to policy makers and legal decision makers and of course to claimants themselves.

The real world of the household duties test

The Social Security Act 1975 required that claimants must be 'incapable of performing normal household duties'.[23] Regulations refined this by requiring that the claimants were 'unable to perform to any substantial extent, or cannot reasonably be expected to perform to any substantial extent, normal household duties'.[24] This expansion of the definition took account of criticism that the wording in the 1975 Act would exclude almost everyone.[25] 'Normal household duties' was not defined. Subsequent case law and amendments to the wording of the regulation demonstrated the difficulty of interpretation, as we shall see below. In the meantime, policy makers and those at the frontline of decision making had to find a way of interpreting what 'normal household duties' might mean in practice. Social security decision makers had struggled with assessing women's capacity for unpaid household work during the inter-war and early post-war periods of social security. During these times attempts had been made to exclude women from national insurance sickness benefits if they

[21] National Insurance Advisory Committee, Social Security Act 1975, Social Security (Non-Contributory Invalidity Pension) Amendment Regulations 1977 (S.I. 1977 No. 1312). Report of the National Insurance Advisory Committee (London: HMSO, 1977), p 5.
[22] Loach and Lister 1978, p30
[23] Social Security Act 1975, 36(2)(b)
[24] Social Security Non-contributory Invalidity Pension (Amendment) Regulations 1977, Reg 13A
[25] National Insurance Advisory Committee, Social Security Act 1975, Social Security (Non-Contributory Invalidity Pension) Amendment Regulations 1977 (S.I. 1977 No. 1312). Report of the National Insurance Advisory Committee (London: HMSO, 1977), p 9.

were able to carry out domestic work at home and legal decision makers had found this very difficult to define in practice.[26] The difficulties of these earlier periods had perhaps been forgotten by the 1970s and similar problems soon emerged.

Claims for HNCIP were decided by an insurance officer based in the Department of Health and Social Security, on the basis of evidence provided by the claimant on the original claim form and by her GP. GP evidence included a medical certificate confirming that the claimant was incapable of work and an additional form relating to the household duties test. DHSS guidance to GPs expected that this would sometimes require a visit to the claimant's home to assess her capacity for household tasks.[27]

The claim form for the benefit (BF450)[28] ran to several pages, which may seem short by today's standards but was longer than the equivalent claim form for NCIP or Sickness or Invalidity Benefit at the time, which required only a medical certificate of incapacity for work. The HNCIP claim form was in three parts. The first contained questions about the claimant's personal details, while the second contained a series of questions about the claimant's accommodation, with the explanation that the questions were 'designed to help you describe the difficulties you have in doing your household work'. The third part of the form contained tick boxes listing a range of household tasks under the headings: 'shopping', 'meals', 'washing and ironing', 'cleaning' and 'general'. The heading 'general' had questions regarding making beds and 'dealing with tradespeople'. There were no questions about child care or household work relating to children, although a question in part two, asking for details of 'others in the household' might suggest that more shopping, cooking and cleaning would

[26] For a detailed discussion of the issue of women's domestic work in these earlier sickness benefits schemes, see J. Gulland, *Gender, Work and Social Control: A Century of Disability Benefits* (Basingstoke: Palgrave Macmillan, 2019)

[27] *DHSS Notes for medical practitioners who are asked to examine married women who have claimed Non-Contributory Invalidity Pension*. Form HA46, filed in PIN 35/657

[28] Claim form BF450, copy in PIN 35/657

be required if there were children or other adults to support. These questions on the claim form were based on an assumption that it was possible to imagine what 'normal' household duties might be, while the questions about the type of house and other members of the household were an attempt to understand what the range of duties might be in the case of the individual claimant. It was noted in a later Commissioner's Decision that the questions on the form were not based on any definition in the legislation but that they were aimed at an assessment of 'normal household duties'.[29]

Part two of the form also asked questions designed to find out the extent to which the claimant was assisted in these household duties by other members of her family. The question was framed as:

> 'because of your condition do you get any help with the household jobs from members of your family or from anyone else?' (q17).

It is useful to consider the wording here. The phrase 'because of your condition' placed the assessment firmly in the medical model of disability, focussing on the claimant's 'condition' and the limitations which this created. The clear assumption here was that all married and cohabiting women had sole responsibility for the housework and that any 'help' they received was the result of their 'condition' rather than any sharing of household tasks within the wider family unit. We can see this in guidance to General Practitioners. The GP's form focussed the questions more specifically on functional abilities such as 'lifting, 'carrying, reaching, bending, walking within the home, walking outside the home, planning and communication.[30] The guidance stated that the assessment of a woman's capacities should take account of 'the size and composition of her family', including young children or elderly relatives, 'the size and nature of the accommodation' and the 'availability of appliances and

[29] R(S)5/78 para 9
[30] Form HA45 copy in PIN 35/657

aids to ease the burden'. Commentators noted that the meaning of 'appliances and aids' was particularly confusing since it was not clear what these might be or how the use of them might make a difference to the claim. Loach and Lister cite several examples of this, including the example of a Mrs N who had an arm amputation and had difficulty carrying out cooking and housework. Mrs N had created her own gadget for chopping vegetables, a wooden board with nails which allowed her to position potatoes so that she could chop them with one hand. She also explained that she could do the hoovering by carrying the hoover flex between her teeth. Mrs N had been found capable of household duties but this decision had been overturned at appeal.[31] Loach and Lister report considerable confusion amongst claimants as to whether such items as Mrs N's homemade gadgets or automatic washing machines and other household equipment counted as 'specialist'.

The presence or absence of others in the household, who might take on some of the responsibility for household work, was equally confusing. The guidance to doctors said:

> The authorities have to decide how much of the normal work the claimant herself can do, not how far other people in the household can substitute for her. For example, although it might be reasonable to expect an adolescent daughter to keep her own bedroom tidy, cooking for the family should be seen as being the housewife's; not the daughter's responsibility. [32]

This attempt to distinguish between the 'duties' of the claimant and 'help' that others might provide was based on an imaginary housewife whose duties were clear to all concerned. There was no mention of adolescent sons or husbands who might be responsible for keeping

[31] I. Loach and R. Lister, *Second Class Disabled - a Report on the Non-Contributory Invalidity Pension for Married Women* (London: Equal Rights for Disabled Women Campaign, 1978), p70.
[32] para 5 Form HA 46 copy in PIN 35/657

their own rooms tidy or contributing to the household work. The use of language that married women were automatically housewives or that unpaid household work, which they might or might not do, was their 'duty' implied a particular construction of family life. This point was made by Loach and Lister in the recommendations from their report in 1978, in which they recommended the abolition of the test altogether. At the very least, they argued, this language should be amended to describe household work as 'tasks' or 'jobs' rather than 'duties'.[33]

Loach and Lister's report also found that women found the test humiliating and distressing. Women who had previously held a wide range of professional and other technically demanding jobs were astonished to discover that their eligibility for benefit should be based on their ability to clean or dust. Some found this humiliating because they felt that it insulted their previous educational or work experience, while others noted that they may have been able to work in jobs which did not require physical strength and that housework was quite different. Loach and Lister describe the test as 'insultingly inappropriate' giving the example of a 'Mrs K' who had previously worked in a hospital lab 'which used my mental powers and not brute strength' and that 'My main job was the one in the Hospital, for which I was highly trained; and it should not be assumed that my main purpose in life is to do housework'.[34] While some women in the nineteen-seventies might have considered that they were 'housewives', the assumption that this was automatic by virtue of their gender and marital or cohabiting status was unacceptable for many claimants.

The practicalities of the household duties test brought further humiliations in the detail which women were required to provide in order to qualify. A revealing case from 1981 concerned a

[33] Loach and Lister, p81
[34] Loach and Lister, p25

woman, described as 'of Indian origin' and as maintaining 'an Indian style of living'[35]. The claimant was fifty-nine, married and living with an adult son, who gave evidence on her behalf at the hearing as she did not speak English. She had claimed and been refused benefit and that decision had been confirmed by a first-tier tribunal. She then appealed to the Commissioner. The Commissioner's decision described her health issues in some detail along with details of her household and her extended family, including another son and his wife and a daughter and her husband and several grandchildren. Only one of her adult children lived with her but the others contributed to the household tasks. The decision referred to the 'labour intensive' requirements of the claimant's cultural expectations in cooking and laundry, with detailed explanation of a typical 'Indian' meal and the complexities of washing and drying saris. Detailed evidence of recent accidents was provided by the claimant's son, including when she fell while trying to lay the table, had caught her sari in the gas cooker or burning her fingers while cooking. The Commissioner showed considerable understanding of the claimant's cultural expectations, stating that the typical meals of the claimant's household would not contain 'frozen and/or ready to use ingredients which so much lighten the burden of most English housewives'.[36] The Commissioner agreed that using these convenience foods would not be acceptable to this particular claimant. The Commissioner pondered what would happen if the claimant had to manage the household on her own, concluding that her family 'would never want for a cup of tea and could eat uncooked chapatti dough' and that this meant that the claimant was not capable of household duties. This case is an example of a National Insurance Commissioner going to considerable lengths to understand the day-to-day life of the claimant, although necessitating considerable detail of her private life and perceived failings as a housewife.

[35] R(S)11/81, para 3
[36] Ibid para 9.

We can compare this case with a claimant in another case who was advised that she could 'open tins', put washing in the washing machine and go shopping with her husband. The woman was thirty seven and had health issues which led to her experiencing exhaustion after any effort. Her local authority had provided her with a home help to assist with the heavier domestic work but this was not considered to be evidence in itself of the claimant's incapacity. She was able to do some 'limited' shopping locally but did most of the shopping at the weekend when her husband was available to drive. The Commissioner considered that she was 'capable of exercising an overall supervision and direction of the assistance she receives'.[37] In this case the claimant was found to be capable of household duties. I cite these two cases, not because the careful consideration given to the claimant in R(S)11/81 was excessive but because it demonstrates the lengths to which claimants and their families were required to provide intimate details of their health, daily lives and relationships with family members in order to qualify for HNCIP.

Appeals

Refusals of HNCIP ran at around 40% of claims in the years between 1978 and 1982, leading to a high volume of appeals. In 1978, 90% of those disallowed benefit appealed against the decision, although that proportion fell to around 30% by 1983.[38] Success rates on appeal ran at around 40%.[39] By 1978 the complexities of interpreting the household duties test led to a key decision by the National Insurance Commissioners: R(S)7/78. The controversy prompted by R(S)7/78 was described by Prosser as 'one of the most important test cases ever brought in

[37] R(S) 7/79, para 11

[38] Although such high levels of appeal are common today, this was considered unusually high at the time, C. Glendinning, *'After Working All These Years': A Response to the Report of the National Insurance Advisory Committee on the 'Household Duties' Test for Non-Contributory Invalidity Pension for Married Women* (London: Disability Alliance, 1980), p31.

[39] statistics on HNCIP appeals from PIN 35/657

social welfare law'.[40] The history of this case began with R(S)5/78, concerning a Mrs M who had claimed HNCIP, was refused and had then appealed successfully to a local tribunal. Mrs M was a married woman in her forties who had been disabled since birth, with an impairment causing paralysis of her right hand side. The local tribunal had found that she was incapable of household duties. The local insurance office appealed against this decision to the National Insurance Commissioner and the case was considered so important to stakeholders that the hearing was attended by observers from the Disablement Income Group (DIG) and the DHSS, along with reporters from *The Guardian*, *The Times* and *The Manchester Evening News.* Papers relating to R(S)5/78 are in the National Archives and provide us with some further detail of what happened at the hearing.[41]

The reported decision on the case, which gives considerable detail of Mrs M's health and the daily routines of her life, is itself revealing of the intrusion required in making a decision on a woman's capacity for household duties. The DIG account of what happened at her hearing, provides a more detailed description of the intrusive questioning regarding her health, the detailed layout of her house, the type of cooker and saucepans that she used. She was asked if she could not use 'convenience foods' and whether 'jacket potatoes' would save her from having to peel them. The DIG reporter concluded that 'The hearing seemed interminable and I doubt anyone less 'tough' than Mrs M would have stood it - particularly the deliberations over the word 'substantial; during which Mrs M was discussed almost as an inanimate object'. [42]

The DHSS observer was much more sceptical of Mrs M's authenticity, observing among other things that 'She gave no satisfactory full explanation of how she spent her time most

[40] T. Prosser, *Test Cases for the Poor: Legal Techniques in the Politics of Social Welfare* (London: Child Poverty Action Group, 1983), p73
[41] Papers in PIN 35/491
[42] Report by Rosemary Till of DIG of the hearing of Mrs M, p1, copy filed in PIN 35/491

days' and that 'when she resumed her seat, she did so without the slightest difficulty and with very sure movements of her left hand and legs'.[43] The Commissioner, however, described Mrs M as a 'candid witness who did not exaggerate her difficulties' and found that she met the requirements for the household duties test and so was entitled to benefit.[44]

Apart from the details of Mrs M's life, the legal argument concerned the interpretation of the meaning of the household duties test and what was meant by being unable 'to perform to any substantial extent… normal household duties'[45]. The Commissioner recognised that 'normal' would mean different things for different people, noting that:

> Since households vary in their composition, facilities and environment the normal household duties of one household may well include duties which do not arise for another, although basic household duties are in large measure common to both. [46]

While the insurance officer had argued that what Mrs M could do was normal for her, the Commissioner noted that this was a circular argument which would lead to no-one qualifying for benefit:

> The greater the incapacity the less can be done; a claimant, whose incapacity was almost total and whose only household duty, for which she had a slight impairment of function, was for instance dusting from her wheelchair, would fail on the ground that she performed her normal household duty to a substantial extent. Such a result seems to me to be incongruous and wrong. [47]

The Commissioner decided that he had to consider the extent to which she could perform normal household duties in the sense of 'the claimant's own household, in relation to the

[43] Report by B L Cawley of the hearing of Mrs M, p4, copy filed in PIN 35/491
[44] R(S) 5/78, para 16
[45] Social Security Non-contributory Invalidity Pension (Amendment) Regulations 1977, Reg 13A
[46] R(S) 5/78, para 9
[47] R(S) 5/78, para 10

duties therein which a capable housewife would perform' and whether her limitations were 'substantial'. He concluded that Mrs M's limitations were substantial and that she, therefore, qualified for benefit.

Following this decision the next case due to be heard by the Commissioners was referred to a tribunal of Commissioners in order to establish clear case law on the matter. This decision was reported as R(S)7/78 and considered similar matters to those in R(S)5/78. The claimant, Mrs T, was a woman aged fifty-four, who had become disabled in her late forties. The tribunal of Commissioners agreed with R(S)5/78 that the key focus of the test was what a woman could *not* do, rather than what she could do and rejected the proposition put forward by the DHSS that claims should succeed only when 'there are virtually no household duties she can perform'. Instead they argued that the meaning of regulation was:

> 'by reason of her disablement she is effectively prevented from running her household in the manner to be expected of a housewife in her circumstances, and to maintain it to the standard appropriate to such circumstances'. [48]

The Commissioners concluded that this had been satisfied by Mrs T and that she was entitled to benefit. The DHSS was concerned that this interpretation of the test would lead to a huge increase in successful claims and brought in amending regulations immediately to try and prevent this surge in claims. The new regulations required that a woman would have to establish that:

> 'she cannot perform such duties to any substantial extent' *and* that she would not be entitled if 'she can reasonably be expected to perform such duties to any substantial extent'.[49]

[48] R(S) 7/78, para 12

[49] Social Security (Non-Contributory Invalidity Pension) Amendment Regulation SI 1978 No 1340.

This apparently subtle change in wording changed the emphasis by requiring decision makers to look at what a woman could do as well as what she could not. The decision was reported on 8th September and the regulations were introduced within days, on 12th September, leading to immediate criticism. The public and political protest regarding the revised regulations led to a National Insurance Advisory Committee report with the remit of considering 'alternative ways to … prescribe the circumstances in which a woman is or is not to be treated as incapable of performing normal household duties'.[50]

The NIAC report outlined the considerable difficulties with HNCIP and the difficulties of formulating and applying a household duties test:

> 'Our consideration of this question and the volume and quantity of the representations we have received have impressed upon us the widespread dissatisfaction which exists about the household duties test. It seems to us that whatever the arguments for applying a special test of this kind to married women in the past, these arguments must inevitably grow weaker in the future as employment outside the home becomes more and more the norm for married women.[51]

It concluded that the DHSS should consider introducing a revised test based on 'normal activity' for both male and female claimants or phasing out the household duties test altogether. However, the remit of the inquiry did not permit such recommendations and instead the report recommended only 'monitoring very carefully the working of the rules', minimising administrative difficulties and avoiding distress to claimants.[52]

[50] National Insurance Advisory Committee, *Report of the National Insurance Advisory Committee on a Question Relating to the Household Duties Test for Non-Contributory Invalidity Pension for Married Women.* (London: HMSO, 1980), p3.
[51] Ibid pp20-21
[52] Ibid p21

The end of HNCIP

Further political lobbying and research by organisations such as the Disability Alliance continued into the early 1980s, continuing to highlight the discriminatory nature of the test as well as the practical difficulties of implementing it.[53] Yet another report by the DHSS in 1983 considered how the household duties test could be revised or abolished. The narrative in this report of the history of the benefit up until that point is illuminating in its view of what the benefit had been about and what the case law had done with it:

> The original intention was to restrict payment of NCIP to what were seen as potential breadwinners only, and to exclude married women on the grounds that they would not normally be in employment. It was not considered practicable or justifiable to seek to distinguish those married women who would have been working outside the home but for their disablement.[54]

The report went on to consider whether the test was indeed discriminatory and concluded that there were three different categories of women who might potentially qualify for HNCIP, distinguishing between 'Congenitally disabled married women' who had been unable to build up a record of work and national insurance contributions and who were therefore deserving of support through a non-contributory benefit , 'Married women, disabled whilst of working age with a previous work record', whom it argued were not deserving of benefit because they had chosen [sic] not to work full time or not to pay the full rate of contributions, and 'married

[53] C. Glendinning and Disability Alliance, *After Working All These Years': A Response to the Report of the National Insurance Advisory Committee on the 'Household Duties' Test for Non-Contributory Invalidity Pension for Married Women* (London: Disability Alliance, 1980); M. Hyman, 'Housewives' Non-Contributory Invalidity Pension: The Case for Abolition of the Household Duties Test in the United Kingdom', *International Social Security Review*, 35 (1982), 319–32 <https://doi.org/10.1111/j.1468-246X.1982.tb00750.x>

[54] Department of Health and Social Security, *Review of the Household Duties Test* (London: HMSO, 1983), p1.

women disabled whilst of working age with no previous work record', whom it argued were deserving of benefit so long as they could pass the household duties test.[55]

What is illuminating for the purposes of this article is that the report perceived a clear differentiation between 'deserving' disabled women who had never had the chance to work, undeserving disabled women who had chosen to work but not to pay full national insurance contributions and deserving disabled women who had chosen marriage and housework as a career but were unable to fulfil their duties in this career. This imaginary differentiation between different groups of women made a clear distinction between those who were deserving of benefit and those who were not, based on assumptions about disabled women's life choices. The report concluded that, although this distinction existed it was not practical to create a test which would differentiate between them in practice. The solution recommended by the report was to introduce instead a gender neutral, and therefore, they argued, non-discriminatory, test which would allow 'an objective test' which would assess disablement rather than loss of function', based on the existing tests of disablement in the war pensions and industrial injuries schemes.[56] Significantly, the level of disablement considered appropriate to qualify for this new benefit was not based on any objective or neutral assessment of what would be a sensible level to apply but on how to get the number of successful claims to about the same level as the household duties test was producing. The report estimated that at a test of '80% disability', 55,000 women would qualify and concluded therefore that an 80% test would produce about the right number of successful claims. [57]

[55] Ibid p5
[56] Ibid p11
[57] Ibid p12

Severe Disablement Allowance

The eventual demise of HNCIP came about as a result of a combination of these legal test cases and the introduction of European Equal Treatment rules, confirming its discriminatory nature.[58] A replacement benefit, Severe Disablement Allowance (SDA)[59], was introduced by the Health and Social Security Act 1984 and was payable to people who had been unable to accumulate sufficient national insurance contributions for Invalidity Benefit, who had been incapable of work for 196 days and who:

> suffers from loss of physical or mental faculty such that the assessed extent of the resulting disablement amounts to not less than 80 per cent.[60]

An exemption from the 80 per cent rule was applied to people who had been continuously incapable of work since before the age of 20.[61] This exemption was an attempt to make the benefit available to disabled people who had never had the opportunity to enter the labour market who were considered more deserving than those who might have made choices about their contributions to the National Insurance scheme. This was a clear reflection of the first category of 'deserving' disabled women, referred to in the 1983 report on HNCIP, although now applied to both men and women. The rules for SDA, were criticised at the time for being

[58] L. Luckhaus, 'Severe Disablement Allowance: The Old Dressed up as New?', *Journal of Social Welfare and Family Law*, 8.3 (1986); J. Sohrab, 'An Overview of the Equality Directive on Social Security and Its Implications for Four Social Security Systems', *Journal of European Social Policy*, 4 (1994), 263–76.
[59] There had been a debate about the best name for this benefit, with a suggestion that 'Disabled Person's Invalidity Pension' would be better, on the grounds that 'Severe Disablement Allowance' would lead to confusion with other disability benefits. However SDA was chosen in the end (papers in PIN 35/657, July 1983).
[60] Social Security Act 1984 S11(1)(5)
[61] Ibid S11(1)(2)

potentially indirectly discriminatory. [62] When subsequently challenged they were found to be in contravention of the Equal Treatment Directive.[63]

SDA itself was abolished in 2000 and replaced by a category of contributory Incapacity Benefit which allowed young people to qualify without the contribution requirement. Other people claiming Incapacity Benefit had to meet the national insurance contribution conditions, thus excluding people without a regular connection with the labour market who became impaired later in life. Married women, whose labour market participation was disrupted by childcare or other gendered expectations, would be particularly affected by the end of SDA.[64] The exception for young people was carried over from Incapacity Benefit to ESA but has also now been abolished so that those who have insufficient national insurance contributions are restricted to means-tested ESA or Universal Credit.[65] There is still continuing entitlement to SDA for those who claimed before it was abolished, although the numbers are declining, with claims standing at 23,000 in February 2018.[66] An interesting footnote to the history of this benefit is that responsibility for SDA continuing claims in Scotland was devolved to the Scottish Parliament as part of the devolution of some social security benefits in the Scotland Act 2016. SDA stands out as an anomaly in the devolved benefits as the only benefit for incapacity for work which was devolved. It is possible that it was devolved in error, resulting from the confusion in names of different types of disability

[62] L. Luckhaus, 'Severe Disablement Allowance: The Old Dressed up as New?', *Journal of Social Welfare and Family Law*, 8.3 (1986), 153–69

[63] N. Harris, 'Beveridge and Beyond: The Shift from Insurance to Means-Testing', in *Social Security Law in Context*, ed. Harris, N. (Oxford: Oxford University Press, 2000, p100, fn98).

[64] N. Wikeley, 'Social Security and Disability', in *Social Security Law in Context*, ed N.Harris, (Oxford: Oxford University Press, 2000), p376.

[65] Welfare Reform Act 2012, s53

[66] https://www.gov.uk/government/statistics/dwp-benefits-statistical-summaries-2018

benefits.[67] The Scottish Government has said that it will not make use of its powers to amend the benefit, recognising that there would be little point.[68]

Three lessons from the household duties test as a form of conditionality

HNCIP was a benefit of its time, although already anachronistic in the 1970s. It was introduced to the world at a time when both the women's movement and the disability movement were gaining strength and when prohibition of discrimination on the grounds of gender was becoming established as standard practice across Europe. Ironically the legislation introducing HNCIP was passed in the same year as the Sex Discrimination Act 1975. Ann Oakley's ground breaking research on the sociology of housework was published in 1974 [69] and the Union of Physical Impaired Against Segregation (UPIAS) statement 'Principles of Disability', often described as the start of the disability movement in the UK, was published in 1976.[70] HNCIP was introduced at a time when most of the assumptions behind it were being challenged by these movements.

There are three lessons which we can learn from HNCIP which are relevant to social security today: that category conditionality can be as important in excluding people from entitlement to financial support as behavioural conditionality; that category conditionality can lead to equally humiliating and degrading assessments; and that assumptions about what is 'normal' are heavily constructed by social assumptions about people's lives.

[67] https://www.blogs.hss.ed.ac.uk/constructingincapacity/2015/02/26/severe-disablement-allowance-scotland/
[68] Scottish Parliament, Social Security (Scotland) Bill Policy Memorandum, 2017 , para 139 <http://www.parliament.scot/S5_Bills/Social%20Security%20(Scotland)%20Bill/SPBill18PMS052017.pdf>
[69] A. Oakley, *The Sociology of Housework* (Oxford: Martin Robertson, 1974).
[70] Union of Physically Impaired Against Segregation and Disability Alliance, *Fundamental Principles of Disability* (London: UPIAS, 1976) <http://disability-studies.leeds.ac.uk/files/library/UPIAS-fundamental-principles.pdf>.

Writers such as Adler, Dwyer and Wright, and Watts and Fitzpatrick[71] are justified in focussing on behavioural conditionality in social security. The introduction of work-seeking conditionality in Employment and Support Allowance and other benefits, along with the intrusive regimes required to enforce these policies, are signs of an increasingly disciplinary state. It is important however that we also pay attention to the more invisible category and circumstance conditions which can be equally powerful in regulating people's behaviour and denying an adequate income to those who do not conform. Disabled people are used to the humiliating assessments required to qualify for disability benefits, where claimants are required to subject themselves to the 'medical gaze'[72] of medical assessors. The particular gendered humiliation of married women being forced to 'admit' that they were unable to keep their houses clean or to feed their husbands and children to an imagined acceptable standard, was particular to its time but similarly intrusive assessments continue today. Today's assessment processes for benefits such as ESA, DLA and PIP require claimants to show that they are unable to carry out a wide range of often very personal activities, involving increasingly intrusive investigations into their daily lives.[73] Even where there is no explicit behavioural conditionality in these benefits, there is an expectation of claimants' willingness to subject themselves to these humiliating assessments in order to qualify for financial support.

Assumptions about what is normal are heavily constructed by social assumptions about people's lives

[71] M. Adler, *Cruel, Inhuman or Degrading Treatment? Benefit Sanctions in the UK* (Basingstoke: Palgrave Pivot, 2018); P. Dwyer, and S. Wright, 'Universal Credit, Ubiquitous Conditionality and Its Implications', *Journal of Poverty and Social Justice*, 22.1 (2014), 27–39; Watts, B. and Fitzpatrick, S. *Welfare Conditionality* (Abingdon: Routledge, 2018).

[72] M. Foucault, *Discipline and Punish: The Birth of the Prison* (Trans Alan Sheridan) (London: Allen Lane, 1977), p184.

[73] For a discussion of this in relation to Disability Living Allowance, see M. Shildrick, *Leaky Bodies and Boundaries: Feminism, Postmodernism and (Bio)Ethics* (London: Routledge, 1997); B. Hughes, 'What Can a Foucauldian Analysis Contribute', in *Foucault and the Government of Disability*, ed. by S. Tremain, (Ann Arbor: University of Michigan Press, 2015).

The original White Paper on NCIP and the DHSS report in 1983 used the language of 'choice' in describing different groups of disabled women and their possible entitlement to financial support. These documents suggested that married women chose to marry, chose to be financially dependent and chose not to work in the labour market. Furthermore, those who worked in the labour market chose to work part-time or chose not to pay full national insurance contributions. While some women may have made these choices, knowing the impact this might have on their future benefit entitlement, many more would not.[74] Even for those who understood the complexities of the social security system, women's labour market participation in the 1970s, and today, is not a matter of individual choice but a construction of gendered expectations in family life.[75]

The attempt to divide women into the three categories of deservingness described in the DHSS report of 1983 assumed that women's participation in the labour market (or not) was a matter of choice, for which they must bear the consequences. So women who did not have control over this choice were the 'most deserving', compared with those who had been able to make choices over their work and household composition. In making these distinctions, the report took no account of the structural factors which lead women (and men) to make choices about work and care. Young disabled people (men and women) were assumed to be deserving because they could not be expected to find work in the labour market. Benefits such as NCIP, SDA and the young people's exemptions in Incapacity Benefit, contributed to this deservingness discourse, while disability studies scholars have shown that this group of

[74] The rules which enabled women to pay a reduced national insurance contributions (the small stamp) changed in 1975 but many women continued to be entitled to do so, although the rules were very complicated. For a discussion of the confusion relating to the contribution rules when they were first introduced see J. Gulland, 'All under One Umbrella? The Family Guide to National Insurance 1948', *Northern Ireland Legal Quarterly*, 68 (2017), 259–70. For the position in 1978, see A. Ogus, and E. Barendt, *The Law of Social Security* (London: Butterworths, 1978)

[75] Feminists writing in the 1970s and early 1980s discussed this, see for example A. Oakley, *The Sociology of Housework* (Oxford: Martin Robertson, 1974) H. Land, 'Who Cares for the Family?', *Journal of Social Policy*, 7 (1978), 257–84; J. Lewis, 'Gender, the Family and Women's Agency in the Building of `welfare States': The British Case', *Social History*, 19 (1994), 37.

people experienced 'systematic marginalisation' from the labour market.[76] The expectation within HNCIP that young disabled women who chose to marry, knowing that they might not be able to fulfil the 'normal' duties of a housewife were considered to be deserving of benefit, not because they had been excluded from the labour market but because their households would have to carry the financial burden of paying for domestic help. Similarly, women who chose to marry and not to work in the labour market but who then became disabled in later life, were considered deserving because their 'choice' to be housewives had been thwarted by their acquired disability. These two groups of women were not at fault. On the other hand women who had married but continued to work in the labour market, although with inadequate national insurance contributions, were considered to be at fault because of their failure to anticipate the possibility of becoming disabled. There might be some validity to this argument, were it not for the fact that men and single women were not subjected to this test of deservingness. The fact that this test of deservingness was also applied to unmarried but cohabiting women, simply on the basis of their assumed financial dependence on their male partners seems even less convincing. If men or single women found themselves disabled in later life, but had not paid national insurance contributions, perhaps because of a disrupted work pattern, they were entitled to NCIP. The perceived difference in deservingness between these married and cohabiting women and men and single women was wholly concerned with the social construction of gender roles.

The gendered assumption behind HNCIP, that married women chose to be financially dependent on their husbands, was only half of the equation. The other half was that married and cohabiting women were solely responsible for household tasks. The note in the advice to doctors that 'adolescent daughters' might be expected to contribute to the household work (but not sons or husbands) shows the depth of the gendered assumptions built into the

[76] S. Shah, and M. Priestley, *Disability and Social Change: Private Lives and Public Policies*. (Bristol: Policy Press, 2011), p145

scheme. We might imagine that these two important assumptions about married women's choices (and the subsequent choices of men and adolescent children for that matter) would be unlikely to be built into social security policy in quite this explicit way today but they are an important reminder that assumptions about what is 'normal' in people's life choices can have significant consequences for the ways in which benefits rules are devised.

More recent social security policies provide examples of this, for example the assumptions in Universal Credit that making benefit payment patterns more 'like work' would prepare people for the labour market[77] or that people would restrict the number of children they have as a result of the 'two child' rule in means-tested benefits. The two-child rule has been described as 'the most significant violation of human rights that has yet been written into the fabric of the UK social security system'.[78] O'Brien argues this on the basis of the rule's implications for children. The so-called 'rape clause' provides an exemption to the two child limit if a child is conceived as a result of rape. This assumes that, in all other circumstances, women are responsible for controlling their own fertility. The assumptions behind the two child rule are a crucial reminder that we should not be complacent regarding the anachronisms of the 1970s.

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[77] J. Millar, and F. Bennett, Universal Credit: Assumptions, Contradictions and Virtual Reality. *Social Policy and Society* 16, (2017)169–182.
[78] C. O'Brien, '"Done Because We Are Too Menny"', *The International Journal of Children's Rights*, 26 (2018), 700–739, p701.